Prestige Ford, Inc. *and* Machinery, Scrap Iron, Metal and Steel, Chauffeurs, Warehousemen, Handlers, Helpers, Alloy Fabricators, Theatrical, Exposition, Convention & Trade Show Employees Union Local No. 714, affiliated with the International Brotherhood of Teamsters, AFL–CIO *and* Stan Jensen

Prestige Ford, Inc. *and* Machinery, Scrap Iron, Metal and Steel, Chauffeurs, Warehousemen, Handlers, Helpers, Alloy Fabricators, Theatrical, Exposition, Convention & Trade Show Employees Union Local No. 714, affiliated with the International Brotherhood of Teamsters, AFL–CIO, Petitioner. Cases 13–CA–32814, 13–CA–32860, 13–CA–32983, and 13–RC–19018

April 22, 1996

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On September 20, 1995, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent and Charging Party Stan Jensen each filed exceptions and separate supporting briefs,[1] and the Respondent filed a brief in answer to the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Prestige Ford, Inc., Chicago, Illinois, its officers, agents, successors, and assigns shall take the action set forth in the Order, except the attached notice is substituted for that of the administrative law judge.

DIRECTION

It is directed in Case 13–RC–19018 that the Regional Director for Region 13 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Clarence Kutella, Joe Hagenauer, Fred Rabka, and Wayne Genis. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

No exceptions were filed to the judge's determination that Fred Rabka and Wayne Genis are not supervisors and that their challenged ballots should be opened and counted.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent challenged the judge's crediting of its former general sales manager, Ver Vynck, disputing the judge's characterization of Ver Vynck's departure from the Respondent's employ as voluntary and asserting instead that he had been terminated from his job. The record reveals that Ver Vynck's departure was precipitated by the Respondent's refusing his request for time off to attend to a family matter, but that Ver Vynck took the time off anyway. Thus, whether Ver Vynck's action amounted to a voluntary quit or whether he was terminated by the Respondent is ambiguous. Irrespective of the label applied to the nature of Ver Vynck's departure, however, we find no basis for disturbing the judge's resolution of his credibility.

[3] We agree with the administrative law judge's conclusion that the 8(a)(1) allegations involving Supervisors Addis and Hardy are not time-barred under Sec. 10(b) of the Act. The Respondent did not raise this defense in its answer to the complaint or at the hearing, but did so for the first time only in its posthearing brief to the judge and in its exceptions to the Board. Thus, as Sec. 10(b) is an affirmative defense and, if not timely raised, is waived, we find the Respondent's 10(b) defense was untimely. *Public Service Co.*, 312 NLRB 459, 461 (1993). In these circumstances, we find it unnecessary to pass on the judge's finding that the disputed complaint allegations are sufficiently related to the original underlying unfair labor practice charge as to warrant a finding of timeliness.

[4] The administrative law judge's notice has been conformed to his recommended Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with being blackballed at other Ford dealerships if they support the Union.

WE WILL NOT threaten employees with store closure, loss of jobs, or loss of benefits, such as the use of demo cars, if they select the Union to represent them.

WE WILL NOT create the impression that it will be futile for our employees to try to select a union as their collective-bargaining representative.

WE WILL NOT discharge employees or modify adversely their benefits because they engage in protected concerted activity or activity on behalf of a union.

WE WILL NOT replace employees' assigned demo cars with cars of lesser value because the employees engage in protected concerted activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Clarence Kutella and Joe Hagenauer reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

WE WILL make Clarence Kutella and Joe Hagenauer whole for any loss of pay and other benefits suffered by them commencing from the date of their unlawful discharges with interest.

PRESTIGE FORD, INC.

Richard Kelliher-Paz, Esq. and *Mary Herman, Esq.*, of Chicago, Illinois, for the General Counsel.

James F. Hendricks Jr., Esq., and *John J. Lynch, Esq.*, of Chicago, Illinois, for the Respondent.

Robert Costello, Esq., of Chicago, Illinois, for the Charging Union.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. The charge and first amended charge in Case 13–CA–32814 were filed on September 20 and December 21, 1994, respectively, by Teamsters Local 714 (Union or Charging Party Union). The charge and first amended charge in Case 13–CA–32860 were filed by the Union on October 3 and December 21, 1994, respectively. The charge and first amended charge in Case 13–CA–32983 were filed by Stan Jensen, an individual, on November 10, 1994, and February 8, 1995, respectively. All of the above charges and amended charges were filed by the Union and Jensen against Prestige Ford, Inc. (Respondent).

On February 28, 1995, the National Labor Relations Board, by the Acting Regional Director for Region 13, issued a consolidated complaint (complaint) that alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). More specifically Respondent is alleged to have violated Section 8(a)(1) of the Act when certain of its supervisors are alleged to have made unlawful threats to employees during a union organizing campaign and when Respondent fired three employees, i.e., Clarence Kutella, Joe Hagenauer, and Stan Jensen allegedly because of their prounion activity.

Respondent filed an answer in which it denied that it violated the Act in any way.

The complaint was consolidated on March 6, 1995, for hearing with a Report on Challenged Ballots.

On December 21, 1994, an election was held among Respondent's salesmen and the vote was 4–4 with several challenged ballots. By the time the trial began before me the challenges went to five individuals. Two of the voters who cast ballots are challenged by the Union as being supervisors and ineligible to vote and it is contended by the Union that their ballots *not* be opened and counted. The Board's challenges go to the three discriminatees in the complaint, i.e., Clarence Kutella, Joe Hagenauer, and Stan Jensen and the Board maintains that they were unlawfully discharged and that their ballots *should* be opened and counted to determine the results of the election.

Respondent maintains that the two individuals challenged as supervisors, i.e., Wayne Genis and Fred Rabka, are not supervisors and their ballots should be opened and counted and that Clarence Kutella, Joe Hagenauer, and Stan Jensen were lawfully discharged prior to the election and their ballots should *not* be opened and counted.

Trial was held before me in Chicago, Illinois, on April 17, 18, and 19, 1995.

On the entire record in this case, to include posttrial briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent, a corporation, with an office and place of business in Chicago, Illinois, has been engaged in the sale and service of automobiles.

Respondent admits, and I find, that it meets the jurisdictional standards of the Board and at all material times has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

Respondent is a Ford dealership in Chicago, Illinois, where both new and used cars are sold and serviced.

Alvin Lee was general manager from December 1993 to July 1994. Since August 1, 1994, he has been president and a minority shareholder and is in the process of purchasing the dealership as part of a special program that Ford has to encourage minority ownership of Ford dealerships. Lee is an African-American.

Prior to September 1994 Jim Hardy was Lee's general manager. In early September he was replaced by Ed Davis.

Steve Ver Vynck was a general sales manager into September 1994 when he was demoted to sales manager. He

voluntarily left Respondent's employ in late November 1994. Al Addis was a sales manager until September 1994 when he voluntarily left Respondent's employ.

Ron Carona came in as a sales manager in September 1994 and later on Rick Castillo came aboard as a sales manager.

In March 1994 a petition was filed by the Union for an election among salesmen at Respondent's facility. The election petition was withdrawn just days before the scheduled April 18, 1994 election because the Union did not think it could win the election.

A second election petition for the salesmen unit was filed on September 12, 1994, but dismissed by the Regional Director for Region 13 on September 26, 1994, because it was untimely filed. A third election petition was filed on October 19, 1994, and an election was held among Respondent's salesmen on December 21, 1994. The vote was four votes for representation by the Union and four votes against representation. An election petition was also filed by a different union in the fall of 1994 seeking representation of Respondent's employees in the service department. An election was held and the Union lost the election by a vote of six to two.

It is alleged that certain 8(a)(1) conduct occurred prior to the first scheduled election in April 1994, which election never took place. And it is alleged that certain 8(a)(1) conduct took place during the fall 1994 organizing campaign and further that prior to the December 1994 election three employees, Clarence Kutella, Joe Hagenauer, and Stan Jensen were fired because of their support for the Union. The 8(a)(1) allegations involving Jim Hardy and Al Addis are not time barred by Section 10(b) because I find they are closely related to the allegations in the first charge filed September 20, 1994, which is less than 6 months removed from the allegations involving Hardy and Addis. See *Redd-I, Inc.*, 290 NLRB 1115 (1988).

Based on their demeanor and the reasonableness of their testimony, etc., I found the following witnesses to be exceedingly worth of belief, i.e., Steve Ver Vynck, Joe Hagenauer, Stan Jensen, and to a somewhat lesser extent, Clarence Kutella.

B. *Alleged 8(a)(1) Conduct by General Manager Jim Hardy*

Jim Hardy was an owner of Respondent and sold the dealership to Ford Motor Company, which, in turn, was going to sell the dealership to Alvin Lee. Jim Hardy, after the sale to Ford, remained as general manager of Respondent until September 1994. Hardy retired in September 1994 and was replaced as general manager by Ed Davis.

I credit Joe Hagenauer that during the spring organizing campaign Jim Hardy told him that if the Union was voted in Hagenauer would never sell Fords again.

I also credit Stan Jensen that Jim Hardy told him in that same time frame that if the Union got in there are still ways to get you (the employee).

I credit Clarence Kutella that Jim Hardy told him that Hardy knew that Kutella had signed up with the Union and that if the Union got in Kutella would lose his demo car and on other occasions Hardy said if the Union got in that Kutella would lose his job and also Hardy told Kutella that Kutella would be blackballed at other Ford dealerships because of his support for the Union.

Jim Hardy also told Joe Hagenauer that for supporting the Union Hagenauer could be fired and would never sell Fords again.

Steve Ver Vynck confirms that he heard Hardy say that if the Union got in there would be no more demo cars.

Jim Hardy conceded when he testified for Respondent that while he didn't use the word ''blackballed'' he did tell employees that they could get hurt in regards to employment at other Ford dealership if their support for the Union at Respondent's facility became known.

Demo cars are cars owned by Respondent that Respondent lets salesmen drive basically as if the salesmen owned the car.

These threats by Jim Hardy are all violations of Section 8(a)(1) of the Act and occurred in April 1994, when he was general manager and prior to the first scheduled election in April 1994, which election was not held.

C. *Alleged 8(a)(1) Conduct by Sales Manager Al Addis*

Clarence Kutella credibly testified that Sales Manager Al Addis told him on numerous occasions in April 1994 (before the first scheduled election, which was not held) that Kutella was ''dumb'' in supporting the Union because it would result in loss of demo cars and the closing of the store.

Addis denied that he ever said employees would lose demo cars and claimed he didn't recall saying the store would lose.

A number of witnesses referred to the dealership as the ''store.''

I find that Addis did threaten loss of demo cars and the closing of the store if employees supported the Union in violation of Section 8(a)(1) of the Act.

D. *Alleged 8(a)(1) Conduct by Sales Manager Steve Ver Vynck*

Steve Ver Vynck credibly testified that he told employee Joe Hagenauer that if Hagenauer left Respondent's employ no other Ford dealership would hire him because of his activity on behalf of the Union.

Joe Hagenauer confirmed that Ver Vynck did tell him that he would be blackballed from selling Fords in Chicago because of his support for the Union.

Stan Jensen also credibly testified that Ver Vynck told him that he could lose his job and be blackballed for supporting the Union.

Ver Vynck's statements to Hagenauer and Jensen were threats in violation of Section 8(a)(1) of the Act. These statements were made in September 1994 when the Union was again trying to organize Respondent's salesmen.

E. *Alleged 8(a)(1) Conduct by General Manager Ed Davis*

Ed Davis was hired by Alvin Lee as general manager in September 1994.

On September 17, 1994, Ed Davis balled out Clarence Kutella at work. Earlier that day Kutella was slow, in Davis' opinion, in taking out a potential buyer for a test drive of a car. More details on this incident are recorded below where the discharge of Clarence Kutella is discussed. See, section III,F, below.

Davis was angry and told Kutella that when he tells Kutella to give someone a test drive he wants it done right away and that he could work Kutella so hard he would never see his family again and could charge $40 for the demo car and then added ''[T]hat there was no union and that there will be no union.'' (Tr. 164.)

Davis denies he told Kutella there would be no union. I credit Kutella and find that Davis' statement to him that there was no union and there would be no union created an impression that it would futile for the employees to try to organize in violation of Section 8(a)(1) of the Act.

F. *The Discharge of Clarence Kutella*

In deciding if Clarence Kutella, Joe Hagenauer, or Stan Jensen was lawfully or unlawfully discharged, I relied on the case of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Clarence Kutella had signed a union authorization card and solicited others to do so in the spring 1994 organizing campaign.

In September 1994 he signed another authorization card and again solicited others to do so.

It seems clear that management was well aware of Kutella's prounion sympathies. Ver Vynck had told Hardy during the spring organizing campaign that he thought Kutella and Hagenauer were prounion and Ed Davis conceded when he testified before me that he knew Kutella and Hagenauer were prounion.

On September 28, 1994, Kutella was fired.

The issue is whether Kutella was fired because of his prounion activity or because of some other legitimate reason.

I note that Ed Davis made the decision to fire Kutella and he made that decision following several incidents with Kutella in September 1994.

Davis became general manager in early September 1994. He had not worked at Respondent's facility prior to that time. It was stipulated by the parties that sales were down in 1993 and continued to be low up to October 1994 vis-a-vis other Ford dealerships in the Chicago area. Davis shook things up at Respondent's facility in order to increase sales. Davis went to an ''open floor'' policy whereby salesmen sold not primarily new or used cars as in the past but sold any car they could—new or used—to a customer. Davis also increased the number of hours that salesmen were required to be at the facility and modified the commission policy that had been in place when he arrived in September 1994.

A second election petition among the salesmen was filed by the Union on September 12, 1994, but dismissed by the Region on September 26, 1994.

On September 17, 1994, Davis had a confrontation with Kutella. A young man and his father were looking at a car to buy for the son. Davis took the father aside for a cup of coffee and told Kutella to give the son a test drive. Eight or so minutes later the son was still standing by the car waiting for Kutella to take him on the test drive. After the sale was made Davis spoke with Kutella and was quite angry. Kutella said he had to make a copy of the young man's driver's license before he could take him for a test drive and Davis insisted that he didn't need to do that and should have more quickly taken the young man for a test drive. This was one incident and it was during this confrontation that Davis told Kutella that there was no union and there would be no union at Respondent's facility. See section III,E, above.

A second incident occurred on September 21, 1994, when Davis instructed Kutella to work in the new-car showroom all day and Kutella did not but left after 20 minutes and went to the used-car area to close a sale with a returning customer and did not return to the new-car area thereafter.

The third incident occurred on the day that Kutella was fired, i.e., September 28, 1994. Kutella was scheduled to report to work at 1 p.m. Kutella had made arrangements, however, to go to the Regional Office of the NLRB to give an affidavit. At or around 10:30 a.m. Kutella called the facility and asked to talk to Davis who wasn't available and Kutella told the receptionist to tell Davis that he would not be in until 3 or 4 p.m. that afternoon.

Kutella did not report in until 5:30 p.m.. He was some 4-1/2 hours late. He told Sales Manager Steve Ver Vynck that he had ''caught the train,'' which was generally understood in the dealership to mean he was delayed by the train that ran some blocks from the dealership. It was a standing joke and the ''excuse'' given by salesmen when they were late for early morning meetings. He immediately thereafter, when Ver Vynck pressed him about why hs was so late, told Ver Vynck that his sister was sick. This was not true of course. Kutella did not tell management that he had been at the Board's office giving an affidavit.

Davis called Ver Vynck into the office and told him to fire Kutella for insubordination. Davis and Ver Vynck remember Kutella saying he was late because he was ''caught in traffic'' and Davis claims he said it loud in the showroom and Davis thought it was insubordinate. Kutella had not been insubordinate in my judgment. If Davis had said I fired Kutella for being late that might have made some sense even though there was evidence that no salesmen had been disciplined for tardiness and Kutella said he had been tardy in the past and not been disciplined, but Davis testified that Kutella was insubordinate when Ver Vynck asked why he was late and Kutella, I find, wasn't insubordinate and no reasonable person could conclude otherwise. I also note that being 4-1/2 hours late is more than simply being tardy.

But most significant in deciding the real reason for Kutella's discharge was Ver Vynck's testimony about what Ed Davis said at a September 1994 managers' meeting. When discussing the problem of the Union at this meeting, Davis, according to the credited testimony of Steve Ver Vynck, said that Respondent would solve the problem of the Union by getting rid of Clarence Kutella, Joe Hagenauer, and Roman Frala.

Kutella and Hagenauer were both fired within the month and Frala was fired 2 weeks before the hearing in this case started in April 1995.

Ver Vynck left Respondent's employ in late November 1994. He was not discharged. He is currently gainfully employed and works with Clarence Kutella. I found Ver Vynck credible. If Ver Vynck was just out to get Respondent he would have said Davis said we'll get rid of Kutella, Hagenauer, and Stan Jensen.

In light of the evidence I conclude that Kutella was fired by Respondent because of his activity on behalf of the Union

in violation of Section 8(a)(1) and (3) of the Act.[1] Respondent would not have fired Kutella but for his activity on behalf of the Union.

G. *The Discharge of Joe Hagenauer*

Joe Hagenauer began his employment with Respondent in September 1991. He was discharged on October 15, 1994.

It was Hagenauer who first contacted the Union about representing the salesmen in February 1994. He had handed out approximately eight union authorization cards and signed one himself.

In mid-March 1994 Steve Ver Vynck asked Hagenauer if he had anything to do with the Union and Hagenauer replied by saying he wasn't at liberty to say.

The election petition for the April 1994 election was later withdrawn.

In September 1994 Hagenauer was not one of the prime movers behind the union organizing drive but did sign another authorization card.

Ver Vynck had told General Manager Jim Hardy back in the spring that Ver Vynck thought that Joe Hagenauer and Clarence Kutella were involved with the Union and Ver Vynck had told Hagenauer that if he left Respondent's employ no one would hire him because of his activity on behalf of the Union.

At the managers' meeting referred to in section III,F above (the discharge of Clarence Kutella) new General Manager Ed Davis, in reference to the union organizing effort, said that the problem (the Union) could be solved by getting rid of Joe Hagenauer, Clarence Kutella, and Roman Frala.

Subsequent to this meeting, on September 19, 1994, Hagenauer was told by Manager Ron Carona to turn in his demo car (a 1994 Ford F-series pickup worth $20,000) and take possession of his new demo car (a Ford Escort worth $11,500). Newer salesmen were being assigned brand new Ford Thunderbirds and Ford Tauruses worth more than Hagenauer's new demo. Even though Respondent was free to give its salesmen less expensive cars as demos they weren't free to assign a lesser valued demo to a salesmen because of his prounion posture. They did so here and it was a violation of Section 8(a)(1) and (3) of the Act.

On September 29, 1994, Hagenauer received a written reprimand for an incident involving a woman who wanted to leave a deposit on a car to be purchased by her son who was in Wisconsin and she needed to talk to her son before the deal could be closed. Manager Ron Carona wrote Hagenauer up for violating a policy that no car would be held for a customer without them buying the car: Hagenauer did what he normally did in the past where a person was putting down a deposit to hold a car for someone else. In this case a mother saying, in effect, hold the car and I'll buy it if I talk to my son and he wants that kind of car. In this case Carona told Hagenauer specifically not to do what he did and the punishment was mild, i.e., a written reprimand, and I find that Respondent in giving this written reprimand did not violate the Act and would have given the written reprimand even if Hagenauer was not prounion.

Hagenauer was fired for an incident on October 15, 1994. Hagenauer was told by Ver Vynck to go to the office of Finance and Insurance Manager Ed Maylath and get an invoice.

The policy at the facility was that a salesman would not enter Maylath's office or disturb Maylath if Maylath was busy with a customer. Hagenauer went to the office, saw Maylath was busy and went back to Ver Vynck who said try again. Hagenauer claims he went to the F & I office a second time and tried to get Maylath's attention to let him in to get something and Maylath waived Hagenauer off and Hagenauer left the area.

Sometime later that day General Manager Ed Davis told Hagenauer he was fired for creating a disturbance at Maylath's office when Maylath was with a customer. Davis alleged that Hagenauer stood outside the office waving his arms. Maylath did not testify. Hagenauer credibly testified that he did not waive his arms or otherwise create a disturbance outside Maylath's office. I credit Hagenauer.

That this nonevent could lead to Hagenauer's dismissal just proves that Respondent wanted to get rid of Hagenauer because of his activity on behalf of the Union and couldn't wait any longer for a ''good reason'' so seized on this nonevent as a pretext to fire Hagenauer.

Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Joe Hagenauer.

H. *The Discharge of Stan Jensen*

Stan Jensen began his employment with Respondent in May 1992. He was fired on November 2, 1994.

During the spring 1994 union organizing campaign, Jensen signed a union authorization card. He also signed two union authorization cards in the fall 1994 campaign.

Jensen testified that he widely promoted the Union at work but in his affidavit given to the Board before the trial he said he was ''close mouthed'' vis-a-vis the Union at work.

At a meeting of employees, to include some who were antiunion, Jensen claims he spoke out about the need for a union citing his own 50-percent decline in earnings in the last couple of years.

On November 2, 1994, Sales Manager Ron Carona told Jensen he was being let go because of poor sales performance. It was General Manager Ed Davis who made the decisions to fire Jensen for low production.

Both Owner Alvin Lee and General Manager Ed Davis testified that Ford salesmen in the Chicago area average 11 sales per month. Jensen was among the lowest rated salesmen at Respondent's facility. Jensen averaged 5.8 sales per month during calendar 1994.

Jensen was clearly not a leading union supporter. Indeed, there is no direct evidence that Respondent's management knew of Jensen's support for the Union. This is unlike the situation where Davis said get rid of Hagenauer, Kutella, and Frala because of the Union. Davis did not say get rid of Jensen. Davis conceded when he testified that he knew that Hagenauer and Kutella were prounion. The key employee contact with the Union in the spring 1994 campaign was Joe Hagenauer, who was fired, and the key employee contact

[1] Although I generally found Kutella to be credible, I do not credit his testimony that back during the spring 1994 campaign he overheard Jim Hardy tell Alvin Lee that Kutella was responsible for the union election petition and that he then heard Alvin Lee say, ''[W]e'll just have to get rid of him.'' Kutella was 20 to 50 feet away when this was supposedly said and it just doesn't seem reasonable to believe he heard this conversation between Hardy and Lee. What Kutella claims he heard Hardy and Lee say doesn't have the ring of truth to it.

with the Union in the fall 1994 campaign was Joe Provenzano, who was not fired.

In light of the above, namely, no evidence that Respondent knew of Jensen's union sympathy and Jensen's low production, I do not believe the General Counsel has proved by that that Stan Jensen was fired because of his support for the Union but rather he was fired for poor production even though his production in the month or two prior to his discharge showed some improvement.

IV. THE ELECTION

On December 21, 1994, an election was held among the unit employees. The vote was four votes for representation and four votes against representation.

There were five challenged ballots. Three of the challenged ballots were those of fired employees Clarence Kutella, Joe Hagenauer, and Stan Jensen. Because I find that Kutella and Hagenauer were unlawfully discharged, their ballots should be opened and counted. Jensen's ballot should not be opened and counted because I find that Jensen was lawfully discharged.

The other two challenged ballots are those of Fred Rabka and Wayne Genis. The votes of these two men are challenged by the Union on the grounds that they were supervisors at the time of the election and ineligible to vote.

Owner Alvin Lee and General Manager Ed Davis testified that both Rabka and Genis were salesmen and not supervisors.

The only evidence to the contrary is from Clarence Kutella. Kutella testified that Fred Rabka was the truck manager for Respondent. Rabka had not even started working for Respondent, however, until after Kutella had been fired. Both Lee and Davis credibly testified that Respondent does not even have a truck manager. Accordingly, I conclude that Rabka had a community of interest with the other salesmen and was not a supervisor and Rabka's ballot should therefore be opened and counted because the Union did not carry its burden of proof that Rabka was a supervisor.

With respect to Wayne Genis both Lee and Davis credibly testified that Genis was a salesman with some additional duties, e.g., he kept inventory records. None of his duties included directing work, hiring or firing, or any other supervisory functions within the meaning of Section 2(11) of the Act.

Kutella testified that he had been told by Davis to report to Genis and that Genis was the used-car manager, that Genis approved sales, which only managers could do, that Genis attended management meetings, and that Genis directed the work of the porters who moved cars around the lot.

Lee and Davis credibly testified that there was no used car manager at Respondent's facility and that Genis did not attend management meetings, responsibly direct the work of others at the facility, or approve sales. I credit Lee and Davis over Kutella with respect to the status of Genis on the grounds that what they said makes more sense and Genis and Kutella only worked together for 10 days before Kutella was discharged.

Accordingly, I find that the Union did not prove that Genis was a supervisor and I find that Genis was a salesman with a community of interest with the other salesmen and his ballot should be opened and counted.

REMEDY

The remedy in this case should include a cease-and-desist order that will, among other things, order the reinstatement with backpay of Clarence Kutella and Joe Hagenauer, and the posting of an appropriate notice. In addition the Regional Director should be ordered to open and count the ballots of Clarence Kutella, Joe Hagenauer, Fred Rabka, and Wayne Genis and issue the appropriate certification of results of the election.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it threatened employees with being blackballed at other Ford dealerships if they supported the Union.

4. Respondent violated Section 8(a)(1) of the Act when it created the impression that it was futile for the employees to try to select a union as their collective-bargaining representative.

5. Respondent violated Section 8(a)(1) of the Act when it threatened employees with store closure, loss of jobs, and loss of benefits, such as use of demo cars, if the Union was selected as their collective-bargaining representative.

6. Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Clarence Kutella and Joe Hagenauer because they engaged in activity on behalf of the Union.

7. Respondent violated Section 8(a)(1) and (3) of the Act when it replaced Joe Hagenauer's assigned demo car with a demo car of lesser value because of Hagenauer's support of the Union.

8. Respondent did not violate the Act in any other way.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Ford Prestige, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with being blackballed at other Ford dealerships if they support the Union.

(b) Threatening employees with store closure, loss of jobs, and loss of benefits, such as the use of demo cars, if they select the Union to represent them.

(c) Creating the impression that it was futile for the employees to try to select a union as their collective-bargaining representative.

(d) Discharging employees because they engaged in protected concerted activity or activity on behalf of a union.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Replacing employees assigned demo cars with cars of lesser value because the employees engaged in protected concerted activity on behalf of the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Clarence Kutella and Joe Hagenauer full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

(b) Make Clarence Kutella and Joe Hagenauer whole for any loss of pay and other benefits suffered by them commencing from the date of their unlawful discharges. Backpay to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay or other moneys due under the terms of this Order.

(d) Post at its facility in Chicago, Illinois, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the Regional Director for Region 13 open and count the ballots of Clarence Kutella, Joe Hagenauer, Fred Rabka, and Wayne Genis from the December 21, 1994 election in Case 13–RC–19018 and that the Regional Director thereafter issue the appropriate certification of results of the election.[4]

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[4] The General Counsel's motion to correct transcript is granted except with respect to the request to change p. 542, L. 19, which is denied because I find the answer of witness Ed Davis to be accurately transcribed and in accord with my recollection of the witness' testimony.